

AGENDA — November 20, 2006, Board Meeting

Proposed Board of Equalization Rules for Tax Appeals

<p>Action 1 — Settled Language</p>	<p>Approve proposed language for <i>Board of Equalization Rules for Tax Appeals</i>:</p> <ul style="list-style-type: none"> • Chapter 1, <i>Title of Division</i> • Chapter 2, <i>Sales and Use Tax, Timber Yield Tax, and Special Taxes and Fees</i> • Chapter 3, <i>Property Taxes</i> • Chapter 4, <i>Appeals from Actions of the Franchise Tax Board</i> • Chapter 5, <i>General Board Hearing Procedures</i> (Except §§ 5000.5015.1 and 5000.5033.2) 				
<p>Action 2 – Alternative Language for Section 5000.5015.1, Communications with Board Members</p>	<table> <tr> <td data-bbox="808 1056 922 1938"> <p>Approve one of three alternatives for section 5000.5015.1 of chapter 5, regarding communications with Board Members:</p> </td><td data-bbox="613 1056 808 1938"> <p>Staff recommends approval of alternative 1, which codifies the Board's longstanding policy regarding communications with Board Members, in order to continue to give taxpayers, constituents, and other government agencies equal and open access to the elected Board Members.</p> </td></tr> <tr> <td data-bbox="418 1056 613 1938"> <p>Alternative 2 contains language recommended by John Davies, Chief Counsel of the Franchise Tax Board (FTB), which restricts communications with Board Members regarding appeals from the FTB. Staff believes that alternative 2 would be difficult to administer, and is not required by law.</p> </td><td data-bbox="224 1056 418 1938"> <p>Alternative 3 contains language recommended by Lenny Goldberg of the California Tax Reform Association, which restricts communications with Board Members regarding all types of appeals. Staff believes that alternative 3 would be difficult to administer, and is not required by law.</p> </td></tr> </table>	<p>Approve one of three alternatives for section 5000.5015.1 of chapter 5, regarding communications with Board Members:</p>	<p>Staff recommends approval of alternative 1, which codifies the Board's longstanding policy regarding communications with Board Members, in order to continue to give taxpayers, constituents, and other government agencies equal and open access to the elected Board Members.</p>	<p>Alternative 2 contains language recommended by John Davies, Chief Counsel of the Franchise Tax Board (FTB), which restricts communications with Board Members regarding appeals from the FTB. Staff believes that alternative 2 would be difficult to administer, and is not required by law.</p>	<p>Alternative 3 contains language recommended by Lenny Goldberg of the California Tax Reform Association, which restricts communications with Board Members regarding all types of appeals. Staff believes that alternative 3 would be difficult to administer, and is not required by law.</p>
<p>Approve one of three alternatives for section 5000.5015.1 of chapter 5, regarding communications with Board Members:</p>	<p>Staff recommends approval of alternative 1, which codifies the Board's longstanding policy regarding communications with Board Members, in order to continue to give taxpayers, constituents, and other government agencies equal and open access to the elected Board Members.</p>				
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Section 5000.5015.1, Alternative 1	Section 5000.5015.1, Alternative 2	Section 5000.5015.1, Alternative 3
5000.5015.1	5000.5015.1	5000.5015.1
<u>Communications with Board Members.</u>	<u>Communications with Board Members.</u>	<u>Communications with Board Members.</u>
The Board Members shall remain accessible to their constituents, their subordinates, other governmental agencies, and taxpayers at all times in order to execute their constitutional and statutory duties. Therefore, such persons and their authorized representatives, including members of the State Bar, may contact Board Members and a Board Member's Staff at any time, including while a matter involving such persons is awaiting an oral hearing before the Board.	(a) Communications Generally. The Board Members shall remain accessible to their constituents, their subordinates, other governmental agencies, and taxpayers, at all times in order to execute their constitutional and statutory duties. Therefore, such persons and their authorized representatives, including members of the State Bar, may contact Board Members and a Board Member's Staff at any time, including while a matter involving such persons is awaiting an oral hearing before the Board. (b) Appeals from the Franchise Tax Board. Persons described in subdivision (a) of this section, including Franchise Tax Board employees, may only communicate with Board Members and their staffs during the pendency of an appeal from an action of the Franchise Tax Board if: (1) Advance Notice and Opportunity to Participate.	The Board Members shall remain accessible to their constituents, their subordinates, other governmental agencies, and taxpayers at all times in order to execute their constitutional and statutory duties. However, in adjudication of tax disputes, they shall refrain from private discussions with the parties in the case about matters pertaining to the case, and endeavor to make sure that all information and issues under adjudication are a matter of public record and subject to public scrutiny. All taxpayer appeals shall be on the record, and held in open hearing process in front of the Board. Information and evidence presented as part of the case will be a matter of public record. The Board shall provide sufficient time in all cases for both sides to make their cases. The Board shall schedule sufficient meetings during the course of a month to provide the time for an appellant to deliver

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	<p>(A) Prior to any oral communication between a party to an appeal or a party's representative and a Board Member or a Board Member's staff regarding any matter at issue in the party's appeal, the Board Member or Board Member's staff shall contact all parties to the appeal and invite them to participate in such communication.</p> <p>(B) Prior to transmitting, filing, or mailing any written communication to a Board Member or Board Member's staff regarding any matter at issue in the party's appeal, the party or party's representative making the written communication shall provide a copy of the written communication to all of the Board Members and the other parties to such appeal. If a Board Member or Board Member's staff receives a written communication and cannot determine whether copies were provided to all of the Board Members and the other parties to the appeal, the Board Member or Board Member's staff shall promptly provide copies of the written communication to all of the Board Members and all parties to the appeal. The written communication shall also be placed in the public record of the</p>	<p>a fully substantiated case, with all information on the record and with sufficient time for clarification of issues by the Board members.</p>
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	<p>appeal.</p> <p>(2) Record of Oral Communications. When all the parties to an appeal do not participate in an oral communication regarding a matter at issue in their appeal, the Board Member or Board Member's staff participating in the communication shall promptly prepare a public record of the communication containing:</p> <p>(A) The date, time, and location of the communication;</p> <p>(B) The caption of the subject appeal from the action of the Franchise Tax Board;</p> <p>(C) A description of the communication;</p> <p>(D) A copy of any written materials provided in conjunction with the communication; and</p> <p>(E) The names of all persons participating in or present during the oral communication.</p> <p>(3) Disclosure to Board Members and Parties. The public record of each oral</p>	
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	<p>communication prepared pursuant to paragraph (2) of this subdivision shall be provided to all of the Board Members and all of the parties to the appeal prior to any oral hearing before the Board or decision on the merits of the appeal (including a decision on a petition for rehearing), and placed in the public record of the appeal.</p> <p>(4) Prehearing Inquiry. Prior to the commencement of an oral hearing or the deliberation on a matter for decision, the Chief of Board Proceedings shall ask the Board Members whether they have received any communications that are required to be placed in the public record, but which have not previously been disclosed on the record of the appeal.</p> <p>(5) Information incorporated into the public record of an oral hearing pursuant to this section shall be made available to the public upon request, unless exempted from disclosure by federal or state law.</p> <p>(6) For purposes of this subdivision:</p> <p>(A) The term “communication” includes communications made in any manner, but does not include briefs filed</p>	
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	<p>pursuant to chapters 4 or 5, or any communications regarding procedural matters that are not at issue in the appeal;</p> <p>(B) The Franchise Tax Board is a party to an appeal from an action of the Franchise Tax Board;</p> <p>(C) An appeal from an action of the Franchise Tax Board is pending from the date the Board receives an appeal filed pursuant to chapter 4, until such time as the Board's decision regarding such appeal becomes final; and</p> <p>(D) Information is included in or disclosed on the public record if it is incorporated into the minutes of an oral hearing, recorded on the transcript of an oral hearing, or added to the official files maintained by the Board Proceedings Division.</p>	
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Action 3 – Alternative Language for Section 5000.5033.2 Regarding Closed Sessions		Approve one of three alternatives for section 5000.5033.2 of chapter 5, regarding closed sessions:	
		Staff recommends approval of alternative 1, which permits the Board to utilize closed sessions to hear trade secrets or other confidential research, development, or commercial information the disclosure of which will cause unwarranted annoyance, embarrassment, or oppression as initially determined by the Board Chair, and utilizes language borrowed from Code of Civil Procedure section 2031.060 regarding protective orders.	
		Alternative 2 was prepared for Board Member Yee and permits the Board to utilize closed sessions to hear trade secrets as defined in the Uniform Trade Secrets Act (Civ. Code, §§ 3426 et seq.) to preserve the trade secret privilege provided for in Civil Code section 1060 as determined by the Board.	
		Alternative 3 was recommended by Lenny Goldberg of the California Tax Reform Association. The third alternative permits the Board to utilize closed sessions to hear trade secrets, but then defines the term “trade secrets” so that it cannot include any “confidential information that is necessary to the adjudication of the case.”	
Section 5000.5033.2, Alternative 1	Section 5000.5033.2, Alternative 2	Section 5000.5033.2, Alternative 3	
5000.5033.2	5000.5033.2	5000.5033.2	
<u>Request for Portion of Oral Hearing Conducted During Closed Session.</u>	<u>Request for Portion of Oral Hearing Conducted During Closed Session to Protect Trade Secret Privilege.</u>	<u>Request for Portion of Oral Hearing Conducted During Closed Session to Hear Identifiable Trade Secret.</u>	

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(a) Board's Discretion to Conduct Oral Hearings During Closed Session.	(a) Board's Discretion to Conduct Oral Hearings During Closed Session.	(a) Board's Discretion to Conduct Oral Hearings During Closed Session.
<p>(1) In general, the Board may conduct portions of oral hearings requested pursuant to chapter 2 or chapter 3 of this division during a closed session held pursuant to Government Code section 11126.</p> <p>(2) The Board may not conduct oral hearings requested pursuant to the following provisions during a closed session:</p> <p>(A) Article 2 of chapter 3 of this division regarding the assessment of unitary or non-unitary property, or an electric generation facility as defined in Revenue and Taxation Code section 721.5.</p> <p>(B) Chapter 4 of this division regarding appeals from the actions of the Franchise Tax Board.</p> <p>(b) Contents of Requests. Taxpayers may request that the Board conduct a portion of an oral hearing requested pursuant to chapter 2 or chapter 3 during a closed session. Such a request shall be in writing.</p>	<p>(1) In general, the Board may conduct portions of oral hearings requested pursuant to chapter 2 or chapter 3 of this division during a closed session held pursuant to Government Code section 11126.</p> <p>(2) The Board may not conduct oral hearings requested pursuant to the following provisions during a closed session:</p> <p>(A) Article 2 of chapter 3 of this division regarding the assessment of unitary or non-unitary property, or an electric generation facility as defined in Revenue and Taxation Code section 721.5.</p> <p>(B) Chapter 4 of this division regarding appeals from the actions of the Franchise Tax Board.</p> <p>(b) Purpose for and Contents of Requests. Taxpayers may request that the Board conduct a portion of an oral hearing requested pursuant to chapter 2 or chapter 3 during a closed session in order to</p>	<p>(1) In general, the Board may conduct portions of oral hearings requested pursuant to chapter 2 or chapter 3 of this division during a closed session held pursuant to Government Code section 11126 only to hear an identifiable trade secret which is maintained by the taxpayer as a proprietary secret in all business practices engaged in by the taxpayer, which must be disclosed in the course of the appeal and cannot otherwise be referred to as a trade secret during the conduct of the hearing, and the disclosure of which, as determined by the Board, would reveal a trade secret that would not otherwise be available to anyone other than the taxpayer.</p> <p>(A) A trade secret does not include any financial information revealed in the course of an appeal, nor any annoyance or other embarrassment that the exposure of such information would reveal, nor any other confidential information which is necessary to the adjudication of the case.</p> <p>(B) The Board shall make every effort</p>

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<p>specifically identify the matter for which the taxpayer's oral hearing was requested, and describe the trade secrets or other confidential research, development, or commercial information, which is likely to be presented at the taxpayer's oral hearing, the disclosure of which will cause unwarranted annoyance, embarrassment, or oppression.</p> <p>(c) Manner of Filing and Due Date for Requests. Requests described in subdivision (b) shall be filed with the Chief of Board Proceedings in the manner provided in section 5000.5027, subdivision (a) no later than the due date of the Response to Notice of Board Hearing provided in section 5000.5006.</p> <p>(d) Review of Requests.</p> <p>(1) Chief Counsel's Review and Recommendation. Upon receipt of a taxpayer's request for the Board to conduct a portion of an oral hearing during a closed session, the Chief Counsel shall:</p> <p>(A) Review the request to determine whether the matter for which the taxpayer's oral hearing was requested</p>	<p>discuss a trade secret (as defined in the Uniform Trade Secrets Act (Civ. Code, §§ 3426 et seq.)) while preserving the trade secret privilege provided by Evidence Code section 1060. Such a request shall be in writing, and:</p> <p>(1) Identify the matter for which the taxpayer's oral hearing was requested;</p> <p>(2) Describe the trade secret to which the request applies;</p> <p>(3) Explain why the Board cannot consider the taxpayer's entire matter during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123 without revealing the trade secret;</p> <p>(4) Describe those portions of the taxpayer's matter that the Board may consider and discuss during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123, without disclosing the trade secret; and</p> <p>(5) Explain why protecting the trade secret from disclosure would not tend to conceal a fraud or otherwise work an</p>	<p>to keep appeals in open session, shall take the narrowest possible interpretation of "trade secret," and to therefore encourage reference to the trade secret in question rather than to close the appeal session.</p> <p>(2) The Board may not conduct oral hearings requested pursuant to the following provisions during a closed session:</p> <p>(A) Article 2 of chapter 3 of this division regarding the assessment of unitary or non-unitary property, or an electric generation facility as defined in Revenue and Taxation Code section 721.5.</p> <p>(B) Chapter 4 of this division regarding appeals from the actions of the Franchise Tax Board.</p> <p>(b) Contents of Requests. Taxpayers may request that the Board conduct a portion of an oral hearing requested pursuant to chapter 2 or chapter 3 during a closed session. Such a request shall be in writing, specifically identify the matter for which the taxpayer's oral hearing was requested, and describe the trade secrets to be</p>
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<p>involves trade secrets or other confidential research, development, or commercial information the disclosure of which would cause unwarranted annoyance, embarrassment, or oppression to any person;</p> <p>(B) Prepare a written recommendation to grant or deny the request; and</p> <p>(C) Submit the taxpayer's request along with the recommendation to the Board Chair.</p>	<p>injustice.</p> <p>(c) Manner of Filing and Due Date for Requests. Requests described in subdivision (b) shall be filed with the Chief of Board Proceedings in the manner provided in section 5000.5027, subdivision (a) no later than the due date of the Response to Notice of Board Hearing provided in section 5000.5006.</p> <p>(d) Review of Requests.</p>	<p>protected from disclosure.</p> <p>(c) Manner of Filing and Due Date for Requests. Requests described in subdivision (b) shall be filed with the Chief of Board Proceedings in the manner provided in section 5000.5027, subdivision (a) no later than the due date of the Response to Notice of Board Hearing provided in section 5000.5006.</p> <p>(d) Review of Requests.</p>
<p>(2) Board Chair's Discretion. Upon receipt of a taxpayer's request for the Board to conduct a portion of an oral hearing during a closed session and the Chief Counsel's recommendation, the Board Chair may direct the Chief of Board Proceedings to schedule the taxpayer's oral hearing so that a portion of the hearing is conducted during a closed session, if the Board Chair determines that:</p> <p>(A) The matter for which the taxpayer's oral hearing was requested involves trade secrets or other confidential research, development, or commercial information the disclosure of which</p>	<p>(1) Chief Counsel's Review and Recommendation. Upon receipt of a taxpayer's request for the Board to conduct a portion of an oral hearing during a closed session, the Chief Counsel shall:</p> <p>(A) Review the request to determine whether the taxpayer's matter involves a trade secrets as defined in the Uniform Trade Secrets Act (Civ. Code, §§ 3426 et seq.), whether the Board can adequately consider the taxpayer's matter during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123 without revealing the trade secret, identify those portions of the</p>	<p>(1) Chief Counsel's Review and Recommendation. Upon receipt of a taxpayer's request for the Board to conduct a portion of an oral hearing during a closed session, the Chief Counsel shall:</p> <p>(A) Review the request to determine whether the matter for which the taxpayer's oral hearing was requested involves trade secrets;</p> <p>(B) Prepare a written recommendation to grant or deny the request; and</p> <p>(C) Submit the taxpayer's request along with the recommendation to the Board Chair.</p>

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<p>would cause unwarranted annoyance, embarrassment, or oppression to any person; and</p> <p>(B) Such information is likely to be disclosed if the taxpayer's oral hearing is conducted solely during an open session at a public meeting.</p>	<p>taxpayer's matter that the Board may discuss during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123 without disclosing the trade secret, and whether protecting the trade secret from disclosure would tend to conceal a fraud or otherwise work an injustice;</p> <p>(B) Prepare a written recommendation to grant or deny the request in whole or in part; and</p> <p>(C) Submit the taxpayer's request along with the recommendation to the Board Proceedings Staff who shall schedule the request for consideration by the Board during a closed session conducted pursuant to Government Code section 11126 at the next regularly scheduled Board meeting, unless the Chief Counsel determines that the Board is prohibited from hearing the request during a closed session.</p> <p>(D) If the Chief Counsel determines that the Board is prohibited from hearing the request during a closed session, the Chief Counsel shall deny the request.</p>	<p>(2) Board Chair's Discretion. Upon receipt of a taxpayer's request for the Board to conduct a portion of an oral hearing during a closed session and the Chief Counsel's recommendation, the Board Chair may direct the Chief of Board Proceedings to schedule the taxpayer's oral hearing so that a portion of the hearing is conducted during a closed session, if the Board Chair determines that the oral hearing involves a trade secret, which must be disclosed in the course of the appeal and cannot be referred to as a trade secret.</p> <p>(3) If a portion of an oral hearing is scheduled to be conducted during a closed session pursuant to paragraph (3) of this subdivision, the portion of the oral hearing during which information described in paragraph (3)(A) of this subdivision is discussed shall be so conducted unless a majority of the quorum present during the closed session votes in favor of a motion to conduct the entire oral hearing during an open session.</p> <p>(4) If a motion is passed in accordance with paragraph (4) of this subdivision,</p>
<p>(3) If a portion of an oral hearing is scheduled to be conducted during a closed session pursuant to paragraph (3) of this subdivision, the portion of the oral hearing during which information described in paragraph (3)(A) of this subdivision is discussed shall be so conducted unless a majority of the quorum present during the closed session votes in favor of a motion to conduct the entire oral hearing during an open session.</p> <p>(4) If a motion is passed in accordance with paragraph (4) of this subdivision, the taxpayer's oral hearing shall be rescheduled so that the entire hearing can be conducted during an open session at a public meeting, and the Chief of Board Proceedings shall issue a new Notice of Board Hearing in accordance with section 5000.5006.</p>		

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<p>(A) The waivers described in subdivision (b) or (c) of section 5000.5033.1 are effective on the date the Board issues its first Public Agenda Notice providing public notice of the date and time of the taxpayer's rescheduled oral hearing.</p> <p>(B) The waivers described in subdivision (b) or (c) of section 5000.5033.1 may be rescinded by the taxpayer at any time before they become effective, if the taxpayer agrees to waive its oral hearing before the Board.</p> <p>(e) Notice of Board Chair's Decision. The Chief of Board Proceedings shall notify the taxpayer of the Board Chair's decision on a request to conduct a portion of an oral hearing during a closed session no later than five days prior to the issuance of the Public Agenda Notice described in section 5000.5033.1, subdivision (d).</p> <p>(f) Definitions. The phrase "trade secrets or other confidential research, development, or commercial information the disclosure of which will cause unwarranted annoyance, embarrassment,</p>	<p>(2) Board's Discretion. The Board may grant a request in whole or in part and the Chief of Board Proceedings shall promptly provide the taxpayer with notice of the Board's decision.</p> <p>(A) If the Board denies a request in its entirety, the taxpayer's entire oral hearing will be conducted during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123, unless the oral hearing is waived.</p> <p>(B) If the Board grants a request in whole or in part, the Board shall conduct a portion of the taxpayer's oral hearing during a closed session held pursuant to Government Code section 11126 in order to hear information pertaining to trade secrets that the Board determines must be discussed during a closed session to protect the taxpayer's trade secret privilege, but the protection of which will not tend to conceal a fraud or otherwise work an injustice.</p> <p>(C) If the Board grants a request in whole or in part, the Board shall hear</p>	<p>the taxpayer's oral hearing shall be rescheduled so that the entire hearing can be conducted during an open session at a public meeting, and the Chief of Board Proceedings shall issue a new Notice of Board Hearing in accordance with section 5000.5006.</p> <p>(A) The waivers described in subdivision (b) or (c) of section 5000.5033.1 are effective on the date the Board issues its first Public Agenda Notice providing public notice of the date and time of the taxpayer's rescheduled oral hearing.</p> <p>(B) The waivers described in subdivision (b) or (c) of section 5000.5033.1 may be rescinded by the taxpayer at any time before they become effective, if the taxpayer agrees to waive its oral hearing before the Board.</p> <p>(e) Notice of Board Chair's Decision. The Chief of Board Proceedings shall notify the taxpayer of the Board Chair's decision on a request to conduct a portion of an oral hearing during a closed session no later than five days prior to the issuance of the</p>
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<p>or oppression” shall be interpreted in the same manner as the terms used therein are interpreted or defined for purposes of Code of Civil Procedure section 2031.060.</p>	<p>any information that is not described in paragraph (2)(B) during an oral hearing conducted during an open session at a public meeting held in accordance with Government Code sections 11120 and 11123, unless the oral hearing is waived.</p> <p>(e) Scheduling of Oral Hearing During Open Session. An oral hearing conducted pursuant to subdivision (d)(2)(A) or portion of an oral hearing conducted pursuant to subdivision (d)(2)(C) shall not appear on a Public Agenda Notice until the Board has decided the taxpayer’s request. If a taxpayer’s oral hearing conducted pursuant to subdivision (d)(2)(A) or portion of an oral hearing conducted pursuant to subdivision (d)(2)(C) is scheduled to be heard less than 15 days before the Board decides the taxpayer’s request, the oral hearing shall be postponed until the next regularly scheduled Board meeting.</p>	<p>Public Agenda Notice described in section 5000.5033.1, subdivision (d).</p>
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